UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 789

Case No. 870: CHANCE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas, on 25 July 1995, Blondel D. Chance, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"...

(i) To find that the Administration denied the Applicant due process for promotion by withholding a post available for promotion purposes during the 1992 promotion review with a view to keeping that post for a preferred candidate who was not at that time eligible for promotion;

(ii) To find that after the Applicant's successful recourse to the Appointment and Promotion Panel for inclusion in the 1992 promotion register, the Executive Office, DESD [Department of Economic and Social Development] acted improperly to influence the Appointment and Promotion Board, contrary to usual procedure, not to endorse the recommendation of the Panel;

(iii) To find that the Respondent's contention that the post in question was redeployed as a result of the ongoing restructuring exercise was a ploy designed to keep the post for a preferred candidate;

(iv) To find that the actions of the Respondent outlined above, in effect, denied the Applicant full and fair consideration for promotion and thereby adversely influenced his seniority in grade and level of remuneration, which caused him moral suffering and professional prejudice.

... To rule that:

...

(b) The Applicant's name be retroactively included in the 1992 promotion G-7 register;

Or, failing that:

(c) The payment of compensation for the period 1 July 1992 until 30 November 1995 which would be the equivalent to the amount [the Applicant would have received] if the Appellant was actually promoted;

(d) The further payment of compensation for the moral suffering and professional prejudice inflicted on the Applicant as a result of the action taken by the Administration."

Whereas the Respondent filed his answer on 6 November 1995;

Whereas, on 1 November 1996, the Tribunal requested the Respondent to provide it with answers to certain questions, which the Respondent did, on 8 and 13 November 1996;

Whereas, on 13 November 1996, the Tribunal requested the Respondent to provide it with certain additional documents, which the Respondent did, on 15 November 1996;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 December 1964, on a short-term appointment, as a Messenger at the G-1 level. He received a three-month fixed-term appointment on 23 June 1965. On 23 September 1965, he was given a probationary appointment.

On 1 January 1967, the Applicant was transferred to the Department of Economic and Social Affairs, Office of Technical Assistance Cooperation, Office of the Director, at the G-2 level with a new functional title of Clerk. On 1 June 1967, his appointment became permanent. On 1 July 1967, he was promoted to the G-3 level. On 1 April 1974, the Applicant was promoted to the G-4 level and given the functional title of Senior Clerk. On 1 April 1978, he was transferred to the Executive Office, Department of Technical Cooperation for Development (DTCD). On 1 December 1978, his functional title was changed to Acting Administrative Assistant. On 1 April 1981, he was promoted to the G-5 level. On 1 January 1985, his grade was raised to G-6, as part of the conversion to new classification standards.

In November 1992, in accordance with ST/AI/373 of 23 December 1991 on placement and promotion, the Departmental Promotion Panel (hereinafter the Departmental Panel) for the G-7 level in DTCD reviewed the qualifications of six candidates, including the Applicant, for the G-7 post with the functional title of Personnel Assistant (UNA-39800-E-P-L-001). It recommended another staff member for this post, whom it deemed better qualified to perform some of the duties, though it recognized that the Applicant had been performing some of those functions in DTCD and was capable and deserving of promotion. The Departmental Panel proposed to give the Applicant a special post allowance (SPA) whenever a post became available. The Departmental Panel did not, however, consider the Applicant as having the requisite qualifications for another vacant post, No. UNA-39805-E-P-L-001 (Finance Assistant), that needed to be filled.

In March 1993, the Appointment and Promotion Panel (APP) met to examine candidates in connection with the two G-7 posts (Personnel Assistant and Finance Assistant) in the Department of Development Support and Management Services (DDSMS). It concurred

with the recommendations of the Departmental Panel. The Appointment and Promotion Board (APB) agreed with the recommendations of the APP.

On 24 June 1993, the Director of Personnel issued ST/IC/1993/29 of 25 May 1993, announcing the 1992 G-7 Promotion Register as approved by the Secretary-General. The Applicant's name was not on the list.

By memorandum dated 9 July 1993 to the APP, the Applicant drew its attention to another vacant post, No. UNA-39240-E-P-L-008, in the Under-Secretary-General's Office.

By memorandum dated 22 September 1993, the Applicant instituted a recourse procedure against the decision not to include him in the 1992 G-7 Promotion Register.

On 4 and 11 October 1993, the APP met to review the Applicant's recourse. In light of the information concerning the post No. UNA-45500-E-P-L-001 (formerly post No. UNA-39240-E-P-L-008) submitted by both the Applicant and the representative of DDSMS, the APP considered the Applicant eligible for promotion and recommended him to the APB for inclusion in the 1992 G-7 Promotion Register.

On 22 November 1993, the APB met to examine the report of the APP. Notes made at that meeting indicated that the APB decided not to accept the APP's recommendation to include the Applicant in the 1992 G-7 Promotion Register due to "serious reservations against promoting [the Applicant]", since a "more technical person" was required for the post in question.

In a letter dated 7 December 1993, the Chairperson of Working Group I of the APP, informed the Applicant that "the re-examination of [his] case by the Appointment and Promotion bodies did not reveal that there were sufficient grounds to amend their previous decision [not to include the Applicant's name in the Promotion Register]."

On 26 January 1994, the Applicant wrote to the Secretary-General requesting a review of the decision, communicated to him on 7 December 1993, not to include his name in the 1992 G-7 Promotion Register.

The Joint Appeals Board (JAB) adopted its report on 18 April 1995. Its considerations, conclusions and recommendation read, in part, as follows:

"Considerations

...

The Panel noted that although the Appointment and Promotion Panel had recommended him for promotion, the Appointment and Promotion Board, after reviewing the qualifications of all candidates for the G-7 post available for promotion, had recommended another candidate as better qualified.

The JAB Panel found that no violation of the Applicant's rights had been committed as there was no allegation that the action of the promotion bodies had been influenced by improper considerations.

The Panel came to the same conclusion with respect to the Applicant's claim in connection with subsequent G-7 vacancies to which he was not appointed. In particular, the Panel could not find any evidence to support the Applicant's allegations that a post description was altered for the purpose of rendering the Applicant ineligible, or that posts were deliberately not made available for promotion purposes so as to make the Applicant's promotion impossible.

Recommendation

The Panel, while recognizing the merits of the Applicant as a staff member and fully understanding his conviction that he deserved a promotion to G-7, especially as he was approaching the end of his career, unanimously concluded that there were no grounds for recommending that the Secretary-General change his decision not to include the Applicant in the G-7 Register. It therefore recommends that the Secretary-General uphold his decision."

On 27 April 1995, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has examined your case in the light of the Board's report, and in accordance with its recommendation, has decided to maintain the contested decision and to take no further action on your case."

On 25 July 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Administration denied the Applicant due process by withholding a post, for which the Applicant was qualified, from the 1992 promotion review with a view to keeping that post for a preferred candidate.

2. The Administration improperly influenced the APB not to endorse the recommendation of the APP.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, but only a right to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by his non-selection to the post in question.

2. The decision not to select the Applicant for the post was not vitiated by extraneous factors.

The Tribunal, having deliberated from 29 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 27 April 1995. That decision adopted a unanimous Joint Appeals

Board (JAB) recommendation that no further action be taken with respect to the Applicant's non-promotion to the G-7 level. The Applicant claims that the Administration denied him due process by withholding a post available for promotion, in order to keep that post for a preferred candidate. The Applicant also argues that the Appointment and Promotion Panel's (APP) recommendation for the Applicant's promotion was not endorsed by the Appointment and Promotion Board (APB), contrary to usual procedure. He also asserts that he was denied full and fair consideration for promotion. Accordingly, the Applicant asks the Tribunal to uphold the recommendation of the APP for his retroactive promotion, or alternatively, to grant him compensation for damages for moral suffering and professional prejudice.

II. The issue before the Tribunal is whether the Administration's decision not to promote the Applicant to a G-7 level post violated his rights. The Tribunal must, therefore, examine whether any infringement or violation of the rights of the Applicant under the Staff Rules and Regulations or denial of due process had occurred in connection with the non-inclusion of his name in the 1992 G-7 Promotion Register.

III. It must be stated at the outset that the Applicant has no right to promotion, but only a right to consideration for a promotion. The Respondent submits that the Applicant was given full and fair consideration for the post for which he applied. The Applicant invoked a recourse procedure against the decision not to include his name in the promotion register. His recourse was rejected only after careful consideration.

The Tribunal has consistently held that "qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy"

(Judgement No. 312, Roberts, 1983). In addition, the Tribunal has recognized the wide discretion that the Secretary-General has in promoting staff members (Judgement No. 362, Williamson, 1986).

IV. It appears to the Tribunal that, in this case, the promotion exercise in question took place at the time of restructuring, which involved identifying posts for redeployment. The Respondent claims that, as a result of restructuring, the post to which the Applicant refers - UNA39240EPL008 - was redeployed to another unit with a new job description. Unfortunately, it appears that the Applicant did not have the necessary qualifications to fill this new post. It is within the discretionary authority of the Secretary-General to withhold a post from promotion in the course of restructuring. Unless the Applicant can prove prejudice or improper motivation on the part of the Respondent when this decision was made, the Tribunal can only conclude that the Applicant's rights were not violated.

V. It is the responsibility of the person alleging prejudice or improper motivation to produce convincing evidence in support of these allegations. The Applicant states that he was denied the promotion because there was a ploy to keep the post for another staff member. The Tribunal has reviewed the material before it and is unable to conclude that extraneous factors were involved in denying the Applicant's promotion. The Tribunal could not find any evidence to support the Applicant's allegations that the post description was altered or that the post was deliberately not made available for promotion in order to deny him a promotion. In this, the Tribunal concurs with the JAB presentation. The Tribunal concludes that the Applicant has not sustained his burden of proof.

VI. The Applicant argues that the APB acted contrary to its usual practice of endorsing the recommendation of the APP when it

recommended the non-inclusion of his name in the 1992 G-7 Promotion Register. The Tribunal has not found that such a practice exists. The APP makes recommendations. It is in the APB's discretion whether to accept them. In this connection, the APB, after reviewing the qualifications of all candidates for the G-7 post, recommended another candidate as better qualified. The Tribunal finds that the Applicant's rights have not been violated by the promotion bodies. The Tribunal therefore rejects the application in its entirety.

VII. The Tribunal is sympathetic to the fact that the Applicant has devoted his career to the United Nations and thus sincerely believes himself deserving of this promotion. The Tribunal notes, in this regard, that the Applicant has been promoted to the G-7 level with effect from 1 September 1995.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary